Reply Exhibit D

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

REPLY AFFIDAVIT OF NEA K. DALTON
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF NORTH CAROLINA)
) ss.
COUNTY OF ALAMANCE)

I, Nea K. Dalton, being sworn, depose and say:

1. I am employed by BellSouth Telecommunications, LLC d/b/a AT&T North Carolina ("AT&T"), one of the Complainants in this matter. I am executing this Reply Affidavit to correct false and misleading statements made in declarations submitted on behalf of Duke Energy Progress, LLC ("Duke Progress") regarding AT&T's comparability to its competitors with respect to the make-ready work that AT&T completes when attaching facilities to Duke Progress's poles and the space AT&T occupies on Duke Progress's poles. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. My job title is Area Manager Outside Plant Planning & Engineering Design. I am based in Greensboro, North Carolina and have engineering and engineering support responsibilities in North Carolina. In my current role, I manage the team that designs and engineers AT&T's aerial attachments to utility poles in north-central North Carolina (from Burlington to Winston-Salem), including AT&T's attachments to Duke Progress's poles. I am familiar with AT&T's Joint Use Agreement ("JUA") with Duke Progress, as well as with agreements and engineering practices governing aerial communications facilities throughout North Carolina.

3. I have over 20 years of experience in the telecommunications industry with AT&T and its predecessor companies and have worked in my present job since 2012. I was originally hired in 2000 as an Outside Plant Design Engineer with responsibility for engineering facilities to accommodate growth and modernization in the Greensboro area of North Carolina. In 2003, I became a Construction Foreman and supervised technicians that performed cable placing, splicing, and repair functions in and around Winston-Salem. In 2005, I was promoted to Construction Scheduler, a job in which I was responsible for assigning and scheduling outside plant construction jobs to technicians and contractors in the Triad area (the north-central region of North Carolina around Greensboro, Winston-Salem, and Burlington). In 2007, I became a Construction Area Manager and then, in 2012, I was promoted to my current job. In late 2019, I assumed additional management responsibilities, and now manage an engineering design team for North Carolina's Triad area. I have a Bachelor of Science Degree in Electrical Engineering from North Carolina State University.

A. Duke Progress's Make-Ready Allegations are Misleading and Incorrect.

4. I reviewed Mr. Freeburn's and Mr. Hatcher's declarations and I disagree with a number of their claims about how AT&T approaches permitting and make-ready work with Duke Progress relative to CLEC and cable television attachers.

5. *First*, Mr. Freeburn claims that "AT&T enjoys benefits vis-à-vis its competitors with respect to the DEP permitting process" because "[u]nlike DEP's CATV and CLEC licensees, AT&T is not required to submit a permit when making a new attachment" or "pay the costs associated with that application incurred by DEP, including inspection costs, and wait for [the] application to be processed in accordance with FCC timelines prior to attaching."[1] This is misleading, and it is wrong that these differences "benefit" AT&T as compared to its competitors. As an initial matter, I have always understood that Duke Progress prefers this permitting arrangement because it means that Duke Progress does not need to submit a permit application each time it seeks to attach facilities to AT&T's poles. And, in my experience, AT&T and Duke Progress have attached new wireline facilities to roughly the same numbers of poles owned by the other party each year, so have "benefitted" equally from this arrangement to the extent it could be described as a "benefit."

6. In addition, the JUA's permitting approach is *not* less expensive for AT&T as compared to the permitting approach Mr. Freeburn describes for CLEC and cable television attachers. Mr. Freeburn says that these AT&T competitors pay for "costs associated with [a permit] application *incurred by DEP*."[2] Duke Progress does not incur similar costs for AT&T because AT&T incurs the costs by performing the work itself. AT&T collects all the relevant

[1] Answer Ex. A at DEP000254 (Freeburn Decl. ¶¶ 20-21).

[2] *Id.* at DEP000254 (Freeburn Decl. ¶ 20) (emphasis added).

information and performs all the necessary pre-construction and post-construction engineering, design, and inspection work when AT&T attaches facilities to the communications space on Duke Progress's poles. AT&T employees travel to the pole location, take all necessary measurements, conduct the required loading analysis, and engineer and design the new facility. AT&T's employees then complete the work and a post-construction inspection for compliance with design and safety specifications.

7. Mr. Freeburn says that Duke Progress "performs the same post-construction inspections with respect to AT&T's attachments as it performs for CATV and CLEC permit applications."[3] This is news to me. I am not aware of any time when Duke Progress duplicated or checked AT&T's pre-construction or post-construction design, engineering or inspection work, and it makes no sense why it would. Certainly, it is *not required* to do so.

8. The JUA's permitting approach is also *not* typically faster for AT&T as compared to the permitting approach Mr. Freeburn describes for AT&T's competitors. AT&T must complete all the same work before attaching its facilities and, while the time needed to complete the same work should be about the same, AT&T often needs to wait longer to begin the work, which then delays its completion. It is noteworthy that Mr. Freeburn admits that AT&T's competitors are able to attach to Duke Progress's poles "in accordance with FCC timelines."[4] Under the JUA, AT&T does not get the benefit of the FCC's make-ready deadlines or one-touch make-ready approach. Instead, AT&T often needs to wait for all existing attachers to sequentially visit the pole and move or relocate their attachments before AT&T can begin the work it requires to attach a new wireline facility. The delay can be significant, and the timing is

[3] *Id.* at DEP000254 (Freeburn Decl. ¶ 21).

[4] *Id.* at DEP000254 (Freeburn Decl. ¶ 20).

out of AT&T's control, as, unlike its competitors, AT&T cannot hire a Duke Progress-authorized contractor to complete the communications space make-ready work after 30 days have lapsed.

9. *Second*, Mr. Freeburn claims that AT&T receives a benefit over its competitors in those few instances when Duke Progress must perform make-ready work for AT&T (such as replacement of Duke Progress poles to create additional capacity for AT&T).[5] This is an exceptionally rare scenario because there is usually space on Duke Progress's poles for an additional communications attachment. (Many Duke Progress poles are 40 feet and taller, and a 40-foot pole can hold the facilities of Duke Progress, AT&T, and at least 3 other attachers.) But when a pole replacement is required, AT&T pays Duke Progress for the cost of the work, as set forth in the schedule in Exhibit B of the JUA. Mr. Freeburn claims that these costs are "significantly less than actual work order costs," which he says Duke Progress would charge AT&T's competitors.[6] This assertion is also a surprise to me. Until I reviewed Mr. Freeburn's declaration, I was not informed by anyone at Duke Progress that it considered the Exhibit B costs insufficient or lower than actual costs.

10. In my opinion, the costs in Exhibit B appropriately reflect the actual cost for the work Duke Progress performs. Duke Progress also updates the costs each year based on the Handy Whitman Index to ensure that those costs stay current. The reason that Mr. Freeburn says actual costs are higher is because he adds costs for additional work when describing a "pole replacement." For example, Exhibit B sets the cost to "replace pole," which is the replacement cost for the pole itself. Mr. Freeburn compares that replacement pole cost to the combined costs

[5] *Id.* at DEP000255-57 (Freeburn Decl. ¶¶ 23-25).

[6] *Id.*

to replace the pole *and* complete additional transfer work after the pole is replaced.[7] As a result, he says an average pole replacement was [redacted] in 2019, but that is an extraordinarily excessive cost for the work actually included in the "replace pole" category of Exhibit B. Mr. Freeburn's comparison is thus misleading and useless.

11. *Third*, Mr. Freeburn claims that AT&T is advantaged by the JUA because Duke Progress sometimes replaces AT&T's poles following an emergency.[8] AT&T pays Duke Progress for these pole replacements, which Mr. Freeburn admits although he repeats his allegation that AT&T would pay more at "actual work order costs."[9] Mr. Freeburn's claim is just as unsupported in this context. Mr. Freeburn also claims that the "benefit to AT&T is that AT&T is able to get this work completed in a timely manner without the cost of carrying crews, equipment, inventory, dispatchers, engineers and all of the other things necessary to replacing a pole in the middle of the night on a moment's notice."[10] This is also misleading. AT&T has an After-Hours Service Restoration Group, which manages damage and construction-related service outages on weekdays between the hours of 4 p.m. and 7 a.m., weekends, and holidays. The After-Hours Service Restoration Group has a dedicated phone line for use by municipal officials, fire and police departments, electric utilities, and first responders and a 1-800 number for the public to timely report problems if an accident or other emergency has damaged a pole.

12. AT&T's After-Hours Service Restoration Group has the equipment, personnel, and resources, including the ability to deploy third-party contractors where necessary, to handle

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[7] *Id.* at DEP000256-57 (Freeburn Decl. ¶¶ 24, 25). Mr. Metcalfe, for example, says he learned from Mr. Freeburn that "equipment transfer costs" are a "significant component" of this estimate. Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48).

[8] Answer Ex. A at DEP000259 (Freeburn Decl. ¶ 33).

[9] *Id.*

[10] *Id.*

the kinds of "emergencies" Mr. Freeburn describes. Despite these available resources, Duke Progress typically receives a call about an emergency before AT&T receives the call because electric facilities pose a safety hazard when downed and need to be cleared first. In those situations, Duke Progress typically reaches the emergency location first, replaces the pole, and then—if the pole was owned by AT&T—invoices AT&T under the JUA. But Mr. Freeburn's suggestion that AT&T receives a benefit from not having to maintain a team ready to restore its poles after hours or in emergency situations could not be more wrong.

13. *Fourth,* Mr. Hatcher claims that "AT&T almost never had to perform make-ready when deploying its attachments on DEP's poles," but that CLECs and cable companies often have to "pay for make-ready and/or pole changeouts in order to accommodate their attachments."[11] This allegation is baseless. Duke Progress has a pole network that accommodates AT&T's facilities and the facilities of AT&T's competitors without typically requiring a lot of make-ready. It is rare for a Duke Progress pole to require replacement to accommodate an additional communications facility. As stated above, many Duke Progress poles are 40-feet and taller and a 40-foot pole can hold the facilities of Duke Progress, AT&T, and at least 3 other attachers. Indeed, a 35-foot pole can accommodate Duke Progress and more than one communications attacher in many circumstances.

14. It is also incorrect to suggest that AT&T requires less make-ready to attach to Duke Progress's poles than its competitors require. Mr. Hatcher says that when cable companies and CLECs deployed their facilities, they "took the pole as they found it. If there happened to be sufficient capacity for the new attacher to attach, it could proceed. However, where there was

[11] Answer Ex. B at DEP000288 (Hatcher Decl. ¶ 15).

insufficient clearance or loading capacity, the new attacher was required to pay for make-ready and/or pole changeouts in order to accommodate their attachments."[12] AT&T is no different when it seeks to attach to Duke Progress's poles. If the pole can accommodate AT&T's facilities, AT&T will be able to proceed with the attachment. But if there is insufficient clearance or loading capacity to accommodate AT&T's facility, AT&T will incur the cost to perform the needed make-ready or will pay for a pole replacement so that it can attach. AT&T is not guaranteed any particular amount of space on Duke Progress's pole and does not "avoid" make-ready that a competitor would require to attach facilities to Duke Progress's poles.

B. Duke Progress's Allegations About the Size of AT&T's Facilities Are Wrong.

15. Mr. Freeburn, Mr. Hatcher, and Mr. Burlison suggest that AT&T's facilities are larger and heavier on average than the aerial facilities of cable companies and CLECs, such that AT&T's facilities require and occupy more space on Duke Progress's poles. This is also unfounded and untrue.

16. *First*, Mr. Freeburn claims that "CATV and CLEC cables are significantly smaller, on average, than AT&T's lines."[13] The data does not support Mr. Freeburn's anecdotal observation. AT&T has devoted significant resources to deploying lightweight fiber optic cables in its overlapping service area with Duke Progress. According to AT&T's engineering records data, over [redacted] percent of AT&T's aerial cable (by linear foot) in North Carolina is lightweight fiber optic cable ([redacted] linear feet) essentially identical to the aerial cable deployed by CLECs and cable companies. This percentage will continue to grow as AT&T places new fiber and replaces copper facilities with new fiber optic cable. In addition,

[12] *Id.*

[13] Answer Ex. A at DEP000251 (Freeburn Decl. ¶¶ 14-15).

AT&T's copper facilities today are not the same as the copper facilities installed many decades ago, which included many pairs, occasionally up to 1,800 pair cables. Of the [redacted] linear feet of copper cable AT&T has deployed in North Carolina, [redacted] percent is 50 pairs or less (weighing under .22 lbs/foot) and over [redacted] percent is 200 pairs or smaller (weighing under .73 lbs/foot). Cable facilities in these sizes are no larger or heavier than the facilities typically installed by CLECs and cable companies. In fact, cable companies have been increasingly overlashing their cable throughout Duke Progress's territory, creating bundles of increasing sizes and weights. Cable company overlashing commonly occurs on AT&T-owned poles as well.

17. *Second*, Mr. Hatcher and Mr. Freeburn claim that AT&T occupies an average of [redacted] feet of space on Duke Progress's poles based on undisclosed data it claims its contractor pulled from 1,039 unidentified poles during the third-party attachment process.[14] Mr. Freeburn explains that these are not actual space measurements, but instead reflect the difference between an alleged measurement of AT&T's highest attachment at a [redacted]-foot elevation and a presumption that above-ground clearance is 18 feet.[15] This alleged space "measurement" is incorrect, inflated, and entirely inconsistent with my decades of experience in the field. I'm not aware of any data establishing that AT&T occupies more than 1 foot of space on average on Duke Progress's poles.

18. Because Duke Progress did not disclose the poles it apparently relies on or provide any reliable evidence of its claim, my team was unable to visit the poles, assess the actual minimum ground clearance required, and obtain proper measurements of the space

[14] *Id.* at DEP000250-251 (Freeburn Decl. ¶¶ 13-14); Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 14).

[15] *See* Answer Ex. A at DEP000248, DEP000250 (Freeburn Decl. ¶¶ 9, 13).

actually occupied by AT&T's physical attachment. My suspicion is that even if these calculations were accurate (and there is no reason to believe, much less confirm that they are) the small number of poles selected might reflect atypical site-specific accommodations (some of which may have been driven by the needs of Duke Progress), and do not accurately reflect AT&T's average attachment height. AT&T's practice is to attach to Duke Progress's poles as low as possible to meet applicable clearance requirements. This typically means that AT&T attaches as close to 18 feet over most roadways, and even lower than 18 feet where roadways or other clearance obstacles are not implicated. But AT&T's service territory includes some very mountainous areas where all attachers must place their facilities higher on a pole to maintain appropriate ground clearance. And, in any event, AT&T can and will occasionally lower its attachments to make room for other attachers when necessary. The alleged [redacted]-foot figure about a select group of undisclosed poles is not a useful basis for calculating AT&T's actual space occupancy.

19. *Third*, Mr. Burlison suggests that a "typical" 40-foot pole holds Duke Progress's facilities and that a taller pole is needed to add communications facilities.[16] This is not true. As noted above, a typical 40-foot pole can accommodate Duke Progress, AT&T, and at least three other communications attachers. And, in my experience, Duke Progress's 40-foot poles, in fact, accommodate AT&T and multiple third parties without requiring replacement or substantial make-ready work, just as AT&T's 40-foot poles do.

[16] Answer Ex. C at DEP000298-99 (Burlison Decl. ¶¶ 14-15).

20. *Fourth*, Mr. Hatcher and Mr. Burlison spend a fair amount of time discussing a prior 1977 joint use agreement that allocated 3 feet of space to AT&T.[17] The 1977 agreement no longer applies. It was replaced by the JUA the parties entered into in 2000. It is also untrue that AT&T uses or is allocated 3 feet of space on Duke Progress's poles. Duke Progress does not "reserve" 3 feet of space on its poles for AT&T. AT&T's facilities are comparable in size to the facilities of AT&T's competitors and Duke Progress lets third-party attachers place their facilities 1 foot above or below AT&T's facilities. This is consistent with the 2000 JUA, which contains no allocation of space for AT&T.

21. *Finally*, Mr. Freeburn claims that the average midspan sag of AT&T's attachments on Duke Progress's poles is [redacted] based on unspecified and undisclosed "DEP data."[18] It is hard for me to imagine how Duke Progress arrived at this figure. AT&T's aerial network in Duke Progress's territory in North Carolina increasingly deploys lightweight fiber optic cables. Fiber optic cables are taut midspan, with virtually no midspan sag, and even when overlashed on existing cable they add minimal weight (and cause no additional sag) to AT&T's existing facility. To the extent AT&T still has copper cables placed in the field, they are primarily lightweight cables comparable in size and weight to AT&T's competitors' aerial cable; as explained above, they also exhibit minimal sag, and certainly no more than competitors' facilities, which are themselves increasingly overlashed.

22. Mr. Freeburn also relies on 3 photographs from Rockingham, North Carolina to argue that AT&T's cables/bundles are larger in diameter and have greater sag than CATV (and

[17] Answer Ex. B at DEP000285 (Hatcher Decl. ¶ 9); Answer Ex. C at DEP000299 (Burlison Decl. ¶ 15).

[18] Answer Ex. A at DEP000251 (Freeburn Decl. ¶ 15).

CLEC) attachments."[19] These photographs are not representative of AT&T's facilities in Duke Progress's territory, as they depict poles within a small geographic area with facilities placed in 2000 that do not reflect AT&T's transition to fiber optic and lighter weight copper cables over the subsequent two decades.

Nea K. Dalton

Sworn to before me on
this 18th day of December, 2020
Kevin William Hogsed North Carolina Alamance County
Expiration April 21, 2024
Notary Public
Kevin William Hogsed

KEVIN WILLIAM HOGSED NOTARY PUBLIC ALAMANCE COUNTY, NC

[19] *Id.* at DEP000251-52, DEP000263-265 (Freeburn Decl. ¶ 16 & Ex. A-1).

Reply Exhibit E

PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

REPLY AFFIDAVIT OF BRYANT E. OAKLEY
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF GREENVILLE)

I, Bryant E. Oakley, being sworn, depose and say:

1. I am employed by BellSouth Telecommunications, LLC d/b/a AT&T South Carolina ("AT&T"), one of the Complainants in this matter. I am executing this Reply Affidavit to correct false and misleading statements made in declarations submitted on behalf of Duke Energy Progress, LLC ("Duke Progress") regarding AT&T's comparability to its competitors with respect to the make-ready work that AT&T completes when attaching facilities to Duke Progress's poles and the space AT&T occupies on Duke Progress's poles. I know the following of my own personal knowledge and, if called as a witness in this action, I could and would testify competently to these facts under oath. I reserve the right to supplement or revise this Reply Affidavit as additional information becomes available.

2. My job title is Area Manager Outside Plant Planning & Engineering Design. I am based in Greenville, South Carolina and have engineering and engineering support responsibilities in South Carolina. In my current role, I manage the team that designs and engineers AT&T's aerial attachments to utility poles in the Greenville-Spartanburg-Anderson metro area, including AT&T's attachments to Duke Progress's poles. I am familiar with AT&T's Joint Use Agreement ("JUA") with Duke Progress, as well as with agreements and engineering practices governing aerial communications facilities throughout South Carolina.

3. I have over 32 years of experience in the telecommunications industry with AT&T and its predecessor companies and have worked in my present job since 2008. I was originally hired in 1987 as an Outside Plant Design Engineer with responsibility for engineering facilities to accommodate growth and modernization in the Greenville area of South Carolina. In 1997, I was promoted to Engineering Project Manager and had responsibility for approving projects, scheduling construction work, and managing design engineers for the Greenville East Area. I assumed my current job in 2008 and have since managed engineering design for AT&T's wireline facilities in Upstate South Carolina. I have a Bachelor of Science Degree in Electrical Engineering from the University of South Carolina.

4. I reviewed Mr. Freeburn's, Mr. Hatcher's, and Mr. Burlison's declarations and I disagree with a number of their claims about AT&T's deployment of facilities and the size and type of AT&T's facilities. I also reviewed the affidavit that my colleague, Nea K. Dalton, is submitting to rebut their claims as they apply to the parties' overlapping service territory in North Carolina.[1] Her experience in North Carolina is consistent with my experience in South

[1] Reply Ex. D at ATT00411-422 (Reply Aff. of N. Dalton (Dec. 18, 2020)).

Carolina. Rather than repeat the entirety of her testimony, I will state that her testimony applies equally to the parties' overlapping service areas in South Carolina.

5. With respect to the deployment of AT&T's facilities, Ms. Dalton explained that the parties' approach to permitting has *not* saved AT&T costs or time in North Carolina as compared to the permitting approach followed by AT&T's competitors. This has also been my experience in South Carolina. AT&T and Duke Progress do not submit permits before attaching to each other's poles because they complete their own inspection, engineering, design, and make-ready work before attaching to the other's poles. I always understood that this was an approach that Duke Progress preferred so that it could perform its own work when attaching to AT&T's poles. And it has typically worked out that Duke Progress attaches new facilities to roughly the same numbers of poles owned by AT&T as AT&T attaches new wireline facilities to poles owned by Duke Progress each year, so any "benefit" to AT&T is comparable to the "benefit" provided Duke Progress.

6. I agree with Ms. Dalton that this approach to make-ready has not saved AT&T costs or sped AT&T's deployment. Mr. Freeburn says that Duke Progress charges cable companies and CLECs "costs associated with [a permit] application *incurred by DEP*."[2] It goes without saying that Duke Progress does *not* incur those costs for AT&T because AT&T does the work itself. And in performing that work, AT&T incurs comparable costs to perform each of the same tasks that Duke Progress performs for cable companies and CLECs before and after they attach facilities to the communications space on Duke Progress's poles. In South Carolina, AT&T collects all the relevant information and performs all the necessary pre-construction and post-construction design, engineering, and inspection work when AT&T attaches facilities to the

[2] Answer Ex. A at DEP000254 (Freeburn Decl. ¶ 20) (emphasis added).

communications space on Duke Progress's poles. Like Ms. Dalton, I am not aware of any time when Duke Progress duplicated or checked AT&T's pre-construction or post-construction design, engineering, or inspection work, and I do not know why they would.

7. Ms. Dalton also explains that AT&T cannot attach to Duke Progress's poles faster simply because AT&T performs this make-ready work itself. As in North Carolina, AT&T regularly encounters delays in South Carolina affecting its ability to begin the required work because other work must first be performed by other attachers on the pole. And, as Ms. Dalton notes, AT&T does not get the benefit of one-touch make-ready or the FCC's make-ready deadlines under the JUA, so AT&T largely lacks control over the timing of this work that must occur first. This can significantly delay AT&T's ability to deploy its facilities.

8. I also agree with Ms. Dalton when she explains that AT&T compensates Duke Progress for make-ready that it requires that Duke Progress perform (such as replacement of Duke Progress poles to create additional capacity for AT&T). These pole replacements are exceptionally rare in South Carolina because there is usually space on Duke Progress's poles for an additional communications attachment. (Many Duke Progress poles are 40 feet and taller, and a 40-foot pole can hold the facilities of Duke Progress, AT&T, and at least 3 other attachers.). But when a replacement is required in South Carolina, AT&T pays Duke Progress the cost of the work, as set forth in the schedule in Exhibit B of the JUA. Until I reviewed Mr. Freeburn's declaration, I was not informed by anyone at Duke Progress that it considered the Exhibit B costs insufficient or lower than actual costs. And, I agree with Ms. Dalton that the Exhibit B costs appropriately reflect the actual cost for the work Duke Progress performs.

9. I also agree with Ms. Dalton when she explains that AT&T does not require less make-ready to attach to Duke Progress's poles than its competitors require. If there is

insufficient clearance or loading capacity to accommodate another communications facility and AT&T seeks to attach, AT&T will incur the cost to perform the needed make-ready or will pay for a pole replacement so that it can attach. AT&T is not guaranteed any particular amount of space on Duke Progress's pole and does not "avoid" make-ready that a competitor would require to attach facilities to that same Duke Progress pole.

10. Ms. Dalton also details AT&T's After-Hours Service Restoration Group, which is also ready and able to respond on nights, weekends, and holidays to emergencies in South Carolina that damage a pole. It is absurd for Mr. Freeburn to suggest that AT&T needs to rely on Duke Progress for this work. AT&T has a devoted team ready to take action.

11. With respect to the size of AT&T's facilities, I agree completely with Ms. Dalton. Cable and CLEC cables are *not* "significantly smaller, on average, than AT&T's lines" as Mr. Freeburn claims.[3] AT&T has also devoted significant resources to deploying lightweight fiber optic cables in South Carolina, including in its overlapping service area with Duke Progress. According to AT&T's engineering records data, over [redacted] percent of AT&T's aerial cable (by linear foot) in South Carolina is lightweight fiber optic cable ([redacted] linear feet) essentially identical to the aerial cable deployed by CLECs and cable companies. This percentage will continue to grow as AT&T places new fiber and replaces copper facilities with new fiber optic cable. In addition, AT&T's copper facilities today are not the same as the copper facilities installed many decades ago, which included many pairs, occasionally up to 1,800-pair cables. Of the [redacted] linear feet of copper cable AT&T has deployed in South Carolina, [redacted] percent is 50 pairs or less (weighing under .22 lbs/foot) and over [redacted] percent is 200

[3] Answer Ex. A at DEP000251 (Freeburn Decl. ¶¶ 14-15).

pairs or smaller (weighing under .73 lbs/foot). Cable facilities in these sizes are no larger or heavier than the facilities typically installed by CLECs and cable companies. In fact, cable companies have been increasingly overlashing their cable throughout Duke Progress's territory in South Carolina, creating bundles of increasing sizes and weights. Cable company overlashing commonly occurs on AT&T-owned poles as well.

12. Like Ms. Dalton, I disagree that AT&T occupies an average of [redacted] feet of space on Duke Progress's poles.[4] This is not an *actual* space measurement, but instead reflects the difference between an alleged measurement of AT&T's highest attachment at a [redacted]-foot elevation and a presumption that above-ground clearance is 18 feet.[5] AT&T's practice in South Carolina is to attach to Duke Progress's poles as low as possible to meet applicable clearance requirements, but as Ms. Dalton explains, it is inappropriate to assume that above-ground clearance is the same as the height of the lowest attachment on a pole, particularly in mountainous areas where all attachers must place their facilities higher on a pole to maintain appropriate ground clearance. The alleged [redacted]-foot measurement is thus incorrect and inflated. It is also entirely inconsistent with my decades of experience in the field. In my experience, AT&T's facilities actually occupy, on average, about the same amount of space on Duke Progress's poles as the 1 foot of space allocated to AT&T's competitors.

13. Like Ms. Dalton, I have no idea how Mr. Freeburn reached his conclusion that the average midspan sag of AT&T's attachments on Duke Progress's poles is [redacted] an allegation that is useless without comparative measurements of the "sag" of other facilities on the same poles,

[4] Answer Ex. A at DEP000250-251 (Freeburn Decl. ¶¶ 13-14); Answer Ex. B at DEP000287 (Hatcher Decl. ¶ 14).

[5] *See* Answer Ex. A at DEP000248, DEP000250 (Freeburn Decl. ¶¶ 9, 13).

and one that contradicts my experience in the field.[6] The photographs attached as Exhibit O-1 depict AT&T aerial facilities in South Carolina and show that they are comparable to the facilities of AT&T's competitors. AT&T has increasingly deployed lightweight fiber optic cables. Fiber optic cables are taut midspan, with virtually no midspan sag, and even when overlashed on existing cable they add minimal weight (and cause no additional sag) to AT&T's existing facility. To the extent AT&T still has copper cables placed in the field, they are primarily lightweight cables comparable in size and weight to AT&T's competitors' aerial cable; as explained above, they also exhibit minimal sag, and certainly no more than competitors' facilities, which are themselves increasingly overlashed.

14. Ms. Dalton has also captured my opinion regarding 40-foot poles, which typically can accommodate Duke Progress, AT&T, and at least three other communications attachers. She has also correctly refuted the argument that Duke Progress somehow reserved 3 feet of space for AT&T under a 1977 agreement that was replaced 20 years ago. Duke Progress does not reserve for AT&T any particular amount of space on its poles in South Carolina and regularly lets third-party attachers place their facilities 1 foot above AT&T's facilities. This is consistent with the 2000 JUA, which contains no allocation of space for AT&T.

Bryant E. Oakley

Bryant E. Oakley

Sworn to before me on
this 18th day of December, 2020

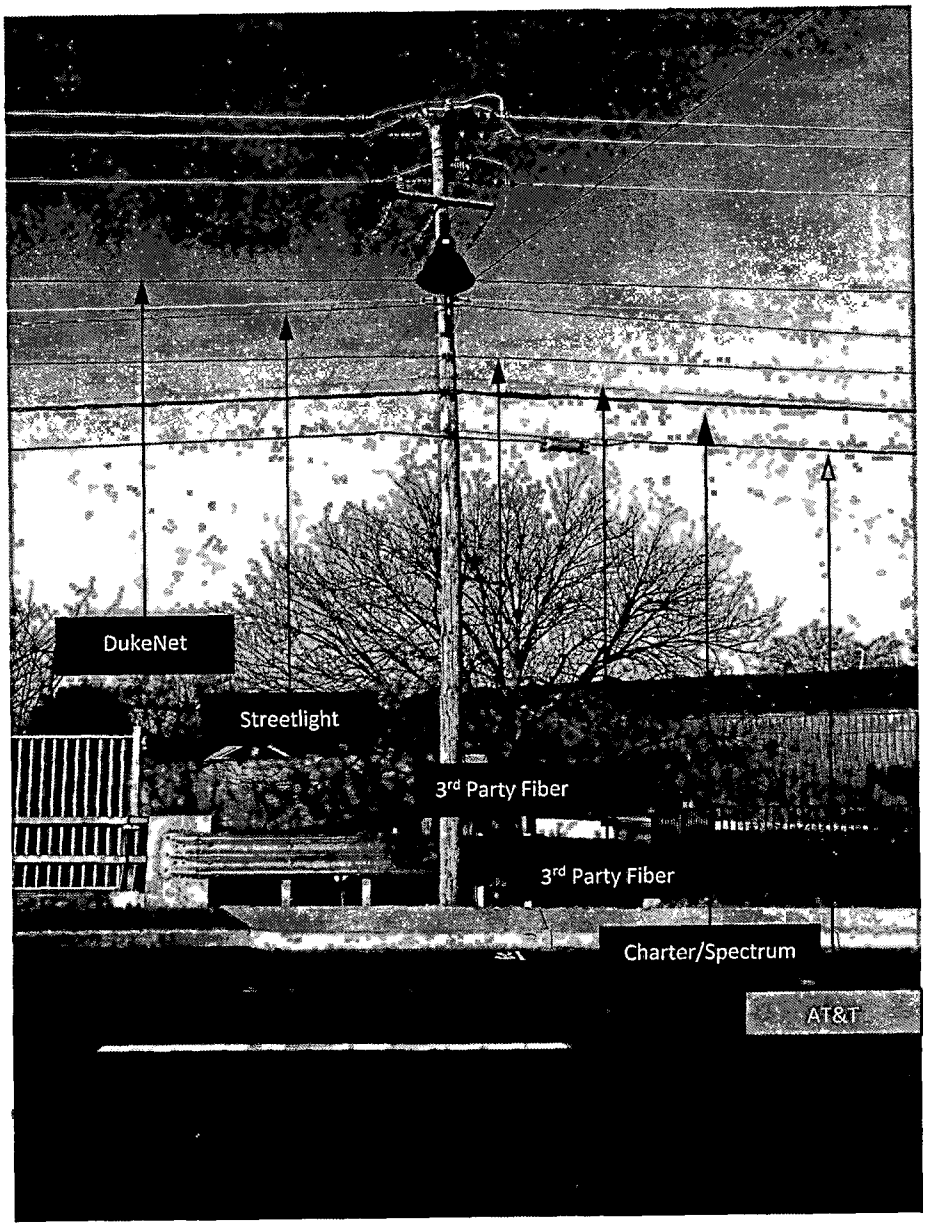
Notary Public

Vickie P. Scibo

My Commission Expires
March 24, 2025

[6] Answer Ex. A at DEP000251 (Freeburn Decl. ¶ 15).

Exhibit O-1



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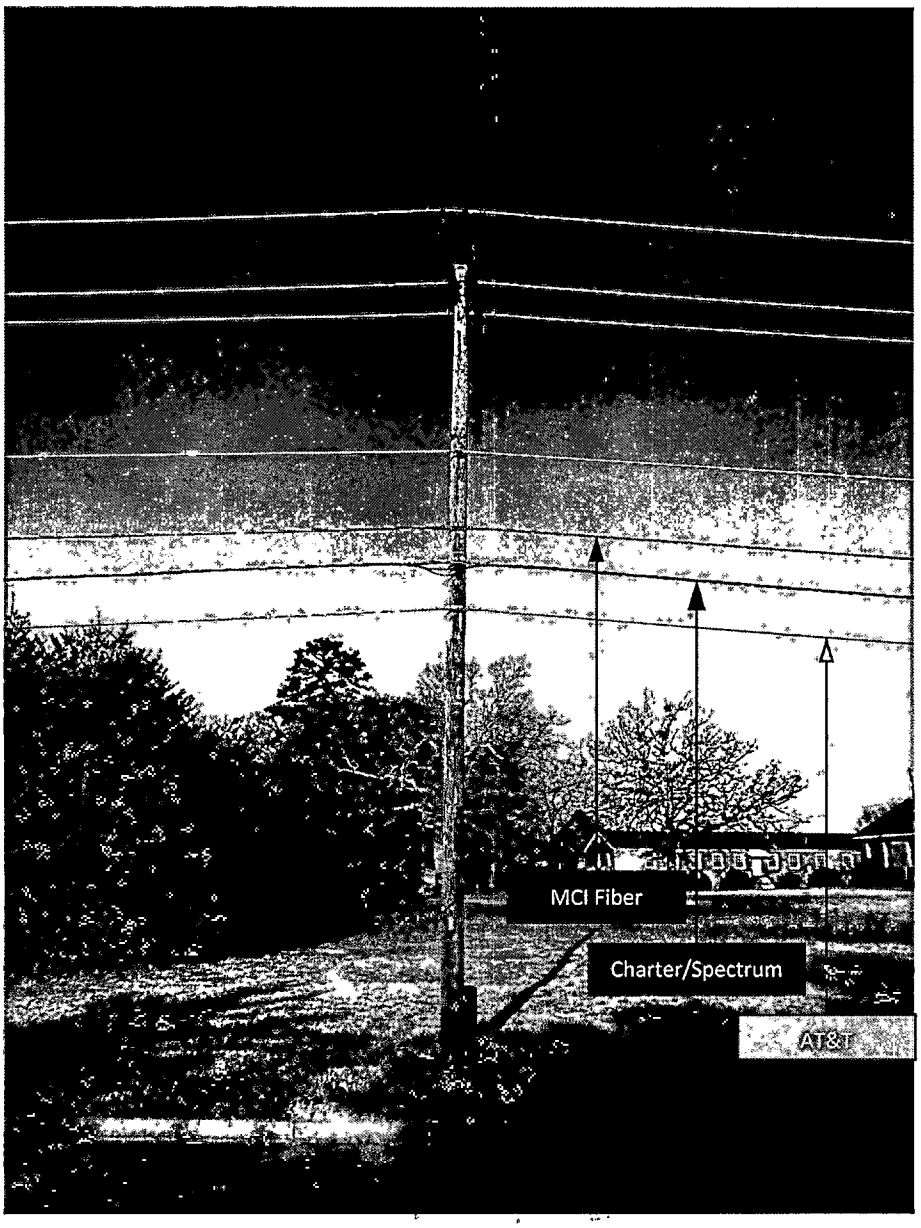

[redacted]

Reply Exhibit F

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

REPLY AFFIDAVIT OF CHRISTIAN M. DIPPON, PH.D.
IN SUPPORT OF POLE ATTACHMENT COMPLAINT

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

I, Christian M. Dippon, Ph.D., hereby declare:

1. My name is Christian M. Dippon. My business address is 1255 23rd Street, Suite 600, Washington, DC 20037. I am a Managing Director at the Washington, DC, office of NERA Economic Consulting (NERA) where I also serve as Chair of the Global Energy, Environment, Communications & Infrastructure (EECI) practice. I submitted an Initial Affidavit in this matter that includes my qualifications as Exhibit A.[1]

[1] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, September 1, 2020, Ex. D, Aff. of C. Dippon, Aug.31, 2020 (hereinafter Dippon Initial Aff.).

2. I prepared this Reply Affidavit at the request of counsel for Complainant BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina (AT&T). Counsel for AT&T requested that I review the Answer and Affirmative Defenses and supporting Declarations, Affidavit, and Exhibits filed by Duke Energy Progress, LLC (Duke Progress or DEP), and respond to Duke Progress' arguments.[2] This Reply Affidavit focuses primarily on Duke Progress' Answer and the Declaration of Kenneth P. Metcalfe.[3]

3. My review of the Duke Progress Answer not only confirms but also reinforces the conclusions in my Initial Affidavit. Specifically, the pole attachment rates that Duke Progress has been charging AT&T under the parties' 2000 Joint Use Agreement (JUA) are not just and reasonable or competitively neutral.[4] Rather, the rates reflect Duke Progress' abuse of its position as owner of a large majority of the utility poles jointly used by the parties. Duke Progress has not presented any evidence that provides a basis for its stark deviation from the new telecom rate. Further, AT&T does not enjoy net material competitive benefits with respect to its use of Duke Progress' poles. Thus, I continue to recommend that the Federal Communications Commission (FCC) set the just and reasonable rate for AT&T's use of Duke Progress' poles at the new telecom rate.

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[2] See Duke Energy Progress, LLC's Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, dated November 13, 2020 (hereinafter Duke Progress Answer).

[3] See Declaration of Kenneth P. Metcalfe, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC,* Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, dated November 12, 2020, attached to Duke Progress Answer as Ex. E (hereinafter Metcalfe Decl.).

[4] Amended and Restated Agreement Covering Joint Use of Poles Between Carolina Power & Light Company and Bellsouth Telecommunications, Inc, October 20, 2000, as periodically updated (hereinafter JUA).

4. As support for my conclusions, I explain that Duke Progress advocates for a rate structure that the FCC has been trying to eliminate for nearly a decade and for rate inputs that the FCC has found unlawful when applied to communications attachers. Duke Progress presents a series of conflicting and uncorroborated arguments aimed at maintaining the current JUA rates, which are over [redacted] times the rates that result from the FCC's new telecom formula and over [redacted] times the rates that result from the FCC's preexisting telecom rate formula. FCC regulations and orders, however, require that Duke Progress base its rates on the FCC's new telecom formula unless it proves by clear and convincing evidence that it provides AT&T net material competitive benefits under the JUA that warrant a deviation from the new telecom formula. Further, if Duke Progress could meet that standard, its rates cannot exceed the rates under the preexisting telecom formula. Duke Progress' refusal to lower and ongoing effort to perpetuate its far higher JUA rates conflicts with the FCC's ratemaking principles and a decade of Commission reforms designed to produce competitively neutral rates.

5. I also detail why Duke Progress' attempted defense of the JUA rates, which is that replicating Duke Progress' pole network would be more expensive and that the JUA rates are similar to new telecom rates calculated using inputs the FCC has found unlawful, is evidence of Duke Progress' continued exercise of market power. Moreover, this defense is at odds with the objectives of FCC orders that mandate just, reasonable, and competitively neutral rates. I also respond to Duke Progress' valuations and arguments, which lack supporting data, are economically and factually incorrect, and would preserve the competitive rate disparities the FCC has previously found unlawful. Finally, I respond to Duke Progress' criticism of my Initial Affidavit.

6. As before, AT&T retained me as an independent expert in this matter. As such, neither my compensation nor my firm's compensation is dependent in any way on the substance of my opinions or the outcome in this matter. I may revise and supplement my opinions herein upon further review and analysis of any new data, materials, expert reports, or pleadings.

I. DUKE PROGRESS ADVOCATES THE RATE STRUCTURE THAT THE FCC HAS BEEN TRYING TO ELIMINATE

7. As explained in my Initial Affidavit, the present dispute is about what constitutes a just and reasonable pole attachment rate that is competitively neutral for AT&T's use of Duke Progress' poles. I highlighted two FCC orders that "offer specific guidance on this topic."[5] Specifically, the 2011 *Pole Attachment Order*[6] and the 2018 *Third Report and Order*[7] make it clear that Duke Progress must charge AT&T the same annual attachment rate that applies to competitive local exchange carriers (CLECs) under the FCC's new telecom formula ($7.84 per pole for the 2019 rental year),[8] *unless* Duke Progress can definitively demonstrate that the JUA would give AT&T a net material competitive advantage over its cable television (CATV) and CLEC competitors.[9] However, Duke Progress may not charge more than the rate justified by the

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[5] Dippon Initial Aff., ¶ 15.

[6] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (hereinafter *Pole Attachment Order*).

[7] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 14 FCC Rcd 18049 (2018) (hereinafter *Third Report and Order*).

[8] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, September 1, 2020, Ex. A, Aff. of D. Rhinehart, Aug. 31, 2020, ¶ 11 (hereinafter Rhinehart Aff.).

[9] See *Third Report and Order*, ¶ 123; *Pole Attachment Order*, ¶¶ 217-218.

net material competitive advantage it proves, with the rate resulting from the FCC's preexisting telecom formula ($11.88 per pole for the 2019 rental year)[10] serving as a ceiling on the just and reasonable rate.[11]

8. The FCC's guidance significantly simplifies the present matter because (using the 2019 rental year as an example) it establishes that $7.84 per pole is the rate that Duke Progress may lawfully charge AT&T, requires Duke Progress to demonstrate with clear and convincing evidence that it may lawfully charge a higher rate, and, in such an event, sets a $11.88 per pole upper bound on the range of potential just and reasonable rates.[12] Rates set outside the FCC's paradigm are, by definition, not just and reasonable or competitively neutral.

9. At [redacted] per pole for the 2019 rental year,[13] the JUA rate Duke Progress charges AT&T is far above the presumptively lawful new telecom rate *and* the preexisting telecom rate. It is thus by definition not just and reasonable or competitively neutral. Duke Progress ignores the FCC's guidelines and pursues a mix of unsupported and inconsistent theories in an attempt to justify its JUA rates—none of which makes economic sense or is consistent with the FCC's conclusions on issues it has already considered and ruled upon. Moreover, Duke Progress unnecessarily complicates this matter by presenting a defense of the JUA rates that depends entirely on a departure from settled ratemaking and competitive neutrality principles. Duke

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[10] See Rhinehart Aff., ¶ 17.

[11] See *Third Report and Order*, ¶ 129; *Pole Attachment Order*, ¶ 218.

[12] *Third Report and Order*, ¶¶ 123-129; 47 C.F.R. § 1.413(b).

[13] See Duke Progress' invoice to AT&T North Carolina, Invoice No. C44812, Period January 1, 2019 – December 31, 2019, Date of Invoice December 4, 2019; Duke Progress' invoice to AT&T South Carolina, Invoice No. C44813, Period January 1, 2019 – December 31, 2019, Date of Invoice December 4, 2019.

Progress' apparent effort to obscure should not be mistaken for the clear and convincing evidence required to justify a departure from the new telecom rate. Its arguments would directly undermine and roll back a decade of FCC pole attachment reforms designed to ensure competitive neutrality and promote deployment and competition in the telecommunications market.

A. Duke Progress' Theories Seek to Retain the Status Quo and Ignore All ILEC Rate Reforms Issued by the FCC Since 2011

10. Duke Progress seeks to preserve the current JUA rental rates by presenting a series of arguments regardless of whether they make sense, are consistent with other theories or FCC ratemaking principles, or grounded in fact. Under one theory, Duke Progress claims that AT&T should pay for 3 feet of space, [redacted] feet of space, [redacted] feet of space, or [redacted] feet of space it says AT&T "constructively" occupies on a pole—without supporting any of these values with survey data that actually measured AT&T's space across the joint use network.[14] Under another theory, Duke Progress argues that AT&T should pay rental rates that cover the cost of its own separate network of poles—which, of course, would mean that AT&T would not occupy any space on Duke Progress' poles.[15] Under a third theory, Duke Progress argues that AT&T instead should pay even higher rates to cover the "make-ready" cost to replace over 148,000

[14] See, e.g., Duke Progress Answer, Executive Summary & ¶ 12.

[15] See, e.g., Metcalfe Decl., ¶ 18 ("To quantify this benefit, I have calculated the costs AT&T would incur to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Progress.").

hypothetical shorter Duke Progress poles with taller poles that accommodate communications attachers.[16]

11. The only commonality in Duke Progress' conflicting theories is its ability to manipulate data and contrive hypotheticals to produce rental rates that approximate or exceed the [redacted] per pole rate that Duke Progress charged AT&T for the 2019 rental year. This, Duke Progress reasons, is enough to establish that the [redacted] per pole rate is just, reasonable, and competitively neutral. There are at least three fundamental errors in Duke Progress' argumentation.

12. First, no combination of Duke Progress' theories replicates the rate that Duke Progress charges AT&T. Under its "constructive" space theory, it selects a [redacted]-foot space occupied value to claim the rate should be [redacted] or [redacted] per pole (for the 2019 rental year).[17] Under its duplicative network theory, it claims AT&T's rate should be at least [redacted] per pole.[18] Its make-ready theory raises that rate further to [redacted] per pole.[19] Mr. Metcalfe suggests that his unsupported values are additive, producing an annual rental rate as high as [redacted] per pole.[20]

13. Of course, the JUA rates are not based on any of these theories. Instead, Duke Progress' arguments are afterthoughts constructed to try to make its excessive JUA rates appear

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[16] See Metcalfe Decl., ¶ 30 ("Per Mr. Freeburn, without the JUA, … AT&T would have been required to pay for pole replacement costs for virtually every JUA pole currently owned by Duke Energy Progress.").

[17] Duke Progress Answer, ¶¶ 12, 31, 37.

[18] Metcalfe Decl., ¶ 20.

[19] Ibid, ¶ 30.

[20] Ibid, Ex. E-1 (apparently adding [redacted] per pole amounts).

less out-of-line. However, all this cannot establish that the JUA rates Duke Progress charges AT&T are, in fact, just, reasonable, and competitively neutral. The [redacted] per pole rate that Duke Progress charged AT&T for 2019 still far exceeds the new and preexisting telecom rates—and the average $26.12 per-pole rate that, in part, led the Commission to adopt the new telecom rate presumption in order to accelerate rate relief to ILECs.[21]

14. Second, Duke Progress does not advocate for a single rate that falls within the range of new and preexisting telecom rates set by the FCC.[22] Indeed, Duke Progress so manipulates the FCC rate formulas to try to support its argument that it asserts new telecom rental rates that are [redacted] times the preexisting telecom rates for the same amount of space occupied,[23] even though properly calculated new telecom rates in Duke Progress' service area are 0.66 times the preexisting telecom rate using the FCC's presumptive inputs.[24]

15. Third, Duke Progress admits that the rates it charges AT&T—and the rates it calculates under its various theories—are not competitively neutral. Specifically, for the 2019 rental year, Duke Progress calculated a [redacted] new telecom rate and a [redacted] cable rate for AT&T's competitors, significantly less than the [redacted] per pole JUA rate that AT&T paid, and every other rate Duke Progress derived under its various theories.[25]

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[21] See *Third Report and Order*, ¶ 125.

[22] As calculated by Mr. Rhinehart, the new and preexisting telecom rates for AT&T's use of Duke Progress's poles were $7.84 per pole and $11.88 per pole, respectively, for the 2019 rental year. *See* Rhinehart Aff., ¶¶ 11, 17.

[23] See Duke Progress Answer, ¶ 31 (claiming [redacted] per pole new telecom rate for 2019); Ibid, ¶ 22 (claiming [redacted] per pole pre-existing telecom rate for 2019).

[24] See 47 C.F.R. § 1.1406(d)(2).

[25] See Answer, ¶ 12; Declaration of Dana M. Harrington, ¶ 10, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a South Carolina v. Duke Energy Progress, LLC,*

16. Fourth, whether considered individually or cumulatively, not one of Duke Progress' theories speaks to the critical issue—specifically, whether Duke Progress currently provides a net material competitive advantage to AT&T *relative to AT&T's competitors*. Duke Progress instead offers unsupported and meaningless accounting exercises premised on its theories about a world that could have been had there been no joint use of utility poles.[26] However, an electric utility "may not embed in [an ILEC]'s rental rate costs that [the electric utility] does not incur."[27] Duke Progress' demand for higher rates based on hypotheticals confirms that it has and continues to abuse its substantial pole ownership advantage to collect unjust and unreasonable rates from AT&T.

17. The goal of each of Duke Progress' theories is to retain the status quo. In doing so, Duke Progress ignores every ILEC rate reform adopted by the FCC since 2011 and tries to justify charging rates that will continue to cause the distorting economic effects the FCC has tried to eliminate. The Commission has rightly recognized that excessive rates like those charged by Duke Progress discourage network rollouts, network upgrades, and other investments. They also provide a competitive advantage to CLEC and CATV providers and overcompensate the power companies. Duke Progress' various theories do not provide a valid economic basis to reverse the FCC's reforms.

Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, dated November 12, 2020, attached to Duke Progress Answer as Ex. D (hereinafter Harrington Decl.).

[26] See, e.g., Duke Progress Answer, ¶ 16 n.58 (arguing case is about "what the parties would have done in the absence of the joint use agreement").

[27] *Verizon Va. v. Va. Elec. & Power Co.*, 32 FCC Rcd 3750, 3759 (¶ 18) (EB 2017) (hereinafter *Dominion Order*).

B. Duke Progress' Calculation of Space Occupied Is Incorrect

18. In its effort to justify its rates, Duke Progress ignores more than the Commission's ILEC rate reforms. It also ignores the Commission's ruling that just and reasonable and competitively neutral rental rates shall be calculated based on the space that the attacher occupies on a utility pole.[28]

19. Under one of Duke Progress' theories, it argues that the new telecom rates charged to AT&T should be [redacted] times the new telecom rates it charged AT&T's competitors. Duke Progress arrives at this multiple by claiming that AT&T occupies [redacted] feet of space on its poles whereas its competitors occupy only one foot of space on those poles. To arrive at AT&T's alleged pole space requirement, Duke Progress sums the 3.33 feet of the safety space and [redacted] feet of space that Duke Progress claims represents the average pole space occupied by AT&T.[29] Duke Progress did not provide any data used to derive this [redacted]-foot value except to state that in the course of the "third-party pole attachment process" in 2019 and 2020, a contractor reported that AT&T's "highest attachment" on 1,039 unidentified poles (0.7% of the 148,064 Duke Progress poles to which AT&T is attached) averaged [redacted] feet above ground.[30] Duke Progress then assumes that the "lowest point of attachment" on those poles was 18 feet, so it subtracts 18

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[28] See 47 C.F.R. § 1.1406(d); *Bellsouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Memorandum Opinion and Order, ¶ 16, 35 FCC Rcd 5321 (2020) (hereinafter *FPL Order*).

[29] See Duke Progress Answer, ¶ 12.

[30] See Declaration of Gilbert Scott Freeburn, ¶ 13, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, dated November 13, 2020, attached to Duke Progress Answer as Ex. A (hereinafter Freeburn Decl.).

feet from [redacted] feet and announces that AT&T "actually" occupies [redacted] feet of space on a pole.[31] There are errors with every aspect of this argument.

1. Duke Progress' Multiplication of New Telecom Rates Violates FCC Rules

20. Duke Progress' multiplication of one foot new telecom rates by the number of feet of occupied pole space violates the Commission's rules, which include rate formulas that "determine the maximum just and reasonable rate *per pole*."[32] The formulas include a "space occupied" input, which is presumptively populated with a 1-foot value for communications attachers but can be adjusted if statistically valid survey data establishes that an attacher occupies more space, on average, across a pole network.[33] This ensures that the unusable space on the pole is proportionally shared among *attaching entities*.[34] Conversely, calculating rates in the manner of Duke Progress leads to artificially high rental rates that overcompensate the electric utility to the detriment of attachers.

2. Commission Precedent Precludes Duke Progress' Safety Space Theory

21. Duke Progress' attempt to assign AT&T 3.33 feet of safety space violates FCC precedent. Earlier this year, the Enforcement Bureau rejected the exact same argument, stating:

> The communication space should not be attributed to AT&T because, under the Commission's rate formula, "space occupied" means space that is "actually occupied," and AT&T's attachments do not actually occupy the communications

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[31] See Duke Progress Answer, ¶ 12 & n.36.

[32] See *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, ¶ 31 (2001) (hereinafter *Consolidated Partial Order*) (emphasis added).

[33] See 47 C.F.R. §§ 1.1406(d), 1.1410.

[34] See 47 U.S.C. § 224(e)(2).

> safety space. Further, the Commission has long held that the communication safety space is for the benefit of the electric utility, not communications attachers. In the 2000 *Pole Attachments Report and Order*, the Commission rejected electric utilities' request to revise the rate formula by removing the safety space from usable space, stating, "It is the presence of the potentially hazardous electric lines that makes the safety space necessary and but for the presence of those lines, the space could be used by cable and [competitive LEC] attachers. The space is usable and used by the electric utilities."[35]

22. Charging AT&T for the safety space would also violate competitive neutrality because, by Duke Progress' own admission, it cannot lawfully charge AT&T's competitors for that space.[36] The FCC found that the "safety space .... is usable and used by the electric utility,"[37] and that does not change when AT&T is attached to the pole. Indeed, AT&T's facilities are often not even located next to the safety space.[38] The safety space is located between Duke Progress' lowest attachment and the highest communications attachment, which is often the attachment of a CLEC or CATV attacher and not AT&T.[39] Further, as Duke Progress' witnesses confirm, Duke Progress does in fact use the safety space for its own facilities.[40]

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[35] *FPL Order*, ¶ 16.

[36] *See* Duke Progress Answer, ¶ 12 n.38.

[37] *Consolidated Partial Order* ¶ 51.

[38] See Peters Reply Aff., ¶ 17.

[39] Ibid.

[40] See Declaration of Steven D. Burlison, P.E., ¶ 9, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, dated November 13, 2020, attached to Duke Progress Answer as Ex. C (hereinafter Burlison Decl.) ("[S]treetlights are occasionally mounted within the Communication Worker Safety Zone on DEP's poles as permitted by the NESC."); Freeburn Decl., ¶ 18 ("[S]treetlights are occasionally mounted within the safety space on DEP's poles").

3. Duke Progress' [redacted]-Foot Measurement Is Hypothetical and Unsupported

23. There are many flaws with Duke Progress' claim that AT&T occupies [redacted] feet of space on a pole. First, Duke Progress does not argue that AT&T's physical attachment occupies [redacted] feet of space.[41] Instead, Duke Progress argues AT&T should pay for space *below* its physical attachment because it thinks "it would not be possible (on average) to locate another wireline communications attachment beneath AT&T" because of the place where AT&T's facilities are affixed to the pole.[42] The Commission, however, sets rates based on "space occupied" by a physical attachment to a pole, not based on space below that attachment.

24. Second, Duke Progress' alleged [redacted]-foot measurement is not actually a measurement of space on any real-world pole. Instead, Duke Progress pairs a contractor's uncorroborated report about 1,039 poles with a presumption that the minimum ground clearance for poles is 18 feet.[43] Further, as Mr. Peters explains, minimum ground clearance is a highly site-specific issue that varies from pole to pole.[44] Even where the minimum ground clearance for a pole is 18 feet, it is still impossible to conclude that the "lowest point of attachment" on the pole will also be 18 feet because that measurement could vary based on site-specific topographical conditions (e.g., a pole could be set at a lower elevation than the road an aerial facility must span).[45]

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[41] See *FPL Order*, ¶ 16 ("under the Commission's rate formula, 'space occupied' means space that is 'actually occupied'").

[42] Freeburn Decl., ¶ 9.

[43] Duke Progress Answer, ¶ 12 & n.36.

[44] Peters Reply Aff., ¶ 19.

[45] Ibid.

25. Third, Duke Progress' theory assumes that it is not possible to locate another attachment below AT&T's wireline facility on a pole. However, Mr. Burlison admits there are third-party attachments below AT&T's facilities on some Duke Progress poles.[46] Mr. Peters also explains that AT&T has encouraged other companies to place their wireless facilities below AT&T's wireline facilities, and it has lowered or raised its facilities to ensure there is room for other communications attachers.[47]

26. Fourth, Duke Progress' measurement is not the product of a statistically reliable and valid survey, as required to rebut the Commission's presumption that a communications facility occupies 1 foot of space, on average, across a pole network.[48] The only information Duke Progress provides is an unsupported statement from Mr. Freeburn about a contractor's measurements "on 1,039 DEP poles to which AT&T is attached."[49] Making matters worse, Mr. Freeburn does not seem to trust the measurements, stating only that they may be accurate.[50] Mr. Freeburn does not provide any data needed to evaluate the alleged measurement. He does not provide pole locations, field data, or an explanation of the methodology used to identify the poles or generate the data. He does not disclose whether the poles were randomly selected or whether they were dispersed throughout the overlapping service area. He does not explain how sampling 1,039 of 148,064 Duke Progress poles (0.7%) to which AT&T attaches could form a

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[46] Burlison Decl., ¶ 17.

[47] Peters Reply Aff., ¶ 19.

[48] See 47 C.F.R. §§ 1.1406(d), 1.1410.

[49] Freeburn Decl., ¶ 13.

[50] Ibid.

representative sample. He does not detail a sampling technique, provide information about a standard deviation, or calculate a confidence interval.

27. Fifth, Mr. Freeburn suggests its [redacted]-foot measurement is somehow corroborated by some other undisclosed set of "DEP data [that] indicates that the average midspan sag for AT&T attachments is [redacted]."[51] No further detail is provided. Mr. Freeburn does not provide information on the sample size, sampling technique, or standard deviation for this claim. He does not identify the poles purportedly reviewed or even explain who completed the measurements or how the cable sag was measured. Mr. Freeburn also does not provide any comparable data about other aerial facilities on Duke Progress' poles. His claim is thus unreliable and also meaningless for comparative purposes.

28. Duke Progress' claim about midspan sag is also irrelevant. The Commission has rejected requests to consider midspan sag located *off the pole* when calculating space occupied *on the pole*. For example, the Commission held that an overlashed facility should be presumed to occupy 1 foot of space on the pole even if the added weight from the overlashing could result in increased pole loading and sag.[52] There is no valid economic reason to treat AT&T's facilities differently.

29. Indeed, all aerial cables are subject to sag, including those for Duke Progress, CATV, and CLEC attachers. However, Duke Progress apparently only wants to charge AT&T for sag. Duke Progress' license agreement includes a pole allocation schematic that depicts the 1-

[51] Ibid, ¶ 15.

[52] *Consolidated Partial Order*, ¶¶ 77-78.

foot space occupied measurement for licensees without reference to sag.[53] It also clarifies that an attachment is a "contact *on a pole.*"[54] Charging AT&T differently violates the principle of competitive neutrality.

30. It would also lead to significant over-recovery if Duke Progress were able to charge for space that is not actually occupied on the pole. For example, by charging for space that is not occupied *on the pole* because it is purportedly "occupied" *between poles*, Duke Progress could recover double for the same segment of pole space—once from the attacher whose attachment is occupying the space on the pole and again from another attacher whose attachment is on the same plane midspan. The Commission instead bases rates on space occupied on the pole itself.

4. Rates Must Be Set Based on Space Occupied, Not Space Allocated

31. Duke Progress' final theory about pole space relies on the 3 feet of space allocated under a prior 1977 JUA, despite the fact that the 2000 JUA does not allocate to AT&T any specific amount of space on Duke Progress' poles.[55] Notwithstanding, the theory fails. "[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"—and not simply allocated.[56] Moreover, AT&T does not actually occupy 3 feet of space on a pole. Indeed, AT&T indicates that it "does not need, want, or use 3 feet of space across Duke Progress' poles for its existing facilities, for future facilities, or for any other

[53] Duke Progress Answer, Ex. 7 at p. 41.

[54] *Id*, § 1.3 (emphasis added).

[55] Duke Progress Answer, Executive Summary, p. i; Ex. 2 at DEP000140 (1977 Joint Use Agreement, Article I.A.2 (hereinafter 1977 JUA).

[56] *FPL Order*, ¶ 16.

purpose, and it cannot sublet that space to others."[57] Instead, AT&T requires space comparable to its competitors, that is, 1 foot of pole space.[58] Duke Progress, meanwhile, still requires the 8 feet of space that it was allocated under the 1977 JUA,[59] plus 3.33 feet of safety space. Its insistence that rates be set based on deleted space allocations that benefit Duke Progress is evidence that Duke Progress has abused its position as the owner of the vast majority of poles jointly used by the parties to perpetuate unjust and unreasonable rates.

32. Competitive neutrality demands that rates for AT&T treat the "space occupied" input to the new telecom formula in the same manner that it is treated for all communications attachers. Duke Progress charges AT&T's competitors based on the presumption that they occupy, on average, 1 foot of space. Thus, in the absence of verifiable data, which Duke Progress has not produced, Duke Progress must apply the same one-foot presumption to AT&T's attachments. Therefore, there is no basis to charge or continue charging AT&T rates that exceed those resulting from the proper application of the new telecom rate using the Commission's default inputs.

II. DUKE PROGRESS CONFIRMED THAT ITS RATES EVIDENCE ITS POLE OWNERSHIP ADVANTAGE

33. In my Initial Affidavit, I explained that Duke Progress has been able to impose and continue charging unreasonably high rental rates over the course of the JUA because of the

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[57] See Peters Reply Aff. ¶ 27.

[58] See Pole Attachment Complaint, BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina, *BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina v. Duke Energy Progress, LLC*, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004, September 1, 2020, Ex. C, Aff. of M. Peters, Aug. 31, 2020, ¶ 24 (hereinafter Peters Aff.).

[59] Burlison Decl., ¶ 14, 1977 JUA, Article I.A.1.

bargaining power it enjoys by virtue of the significant disparity in pole ownership between Duke Progress and AT&T. The analyses performed by Duke Progress' outside accountant, Mr. Metcalfe, exemplifies Duke Progress' disregard of the FCC's competitive concerns and its intention to use its pole ownership advantage to continue charging uncompetitively high JUA rates.

34. The essence of Mr. Metcalfe's argument is that Duke Progress' pole attachment rates are just and reasonable because they are significantly lower than what AT&T would pay if it had to furnish and install poles to replace the Duke Progress poles to which it currently attaches. Specifically, Mr. Metcalfe argues that but-for the JUA, AT&T would need "to replace the network AT&T currently has in place on the joint use poles owned by Duke Energy Progress."[60] This, Mr. Metcalfe argues, would cost [redacted] per pole per year in perpetuity.[61] Mr. Metcalfe acknowledges that Duke Progress would also need to replace the 30,598 AT&T poles to which it is attached. After providing an offset to account for these poles, Mr. Metcalfe concludes that AT&T would still need to pay [redacted] per pole in perpetuity without the JUA and Duke Progress would pay nothing.[62] Mr. Metcalfe concludes, "[T]his is a significant and fundamental contractual benefit to AT&T associated with the JUA."[63]

35. Before addressing the many conceptual errors contained in Mr. Metcalfe's calculations, it is important to examine his argument because it makes the very point that I made in my Initial Affidavit. Mr. Metcalfe's argument and after-the-fact claims clearly demonstrate

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[60] Metcalfe Decl., ¶ 18.

[61] Ibid, ¶ 20.

[62] Ibid, ¶ 20 and Ex. E-2.

[63] Ibid, ¶ 21.

that Duke Progress has superior bargaining power over AT&T. He opines that it was just and reasonable for Duke Progress to charge AT&T [redacted] per pole for 2019 rent because it was lower (significantly so) than AT&T's next best alternative of placing its own poles, which would have cost AT&T [redacted] per pole.[64] However, Mr. Metcalfe's calculation does not establish the justness or the reasonableness of the attachment rate, let alone its competitive neutrality.

36. A just and reasonable rate obtained through commercial negotiations requires that the parties be equal partners and that they possess relatively equal bargaining power such that the resulting price is independent of their relative bargaining positions. However, Mr. Metcalfe demonstrates that AT&T would stand to lose far more than Duke Progress would lose absent joint use. Even under his highly flawed calculations, he values this difference at [redacted] per pole—the amount AT&T would have to pay Duke Progress under his analysis, equal to nearly [redacted] million every year in perpetuity.[65]

37. This [redacted] million annual difference refutes Duke Progress' claim that AT&T "can choose at any time to remove its facilities from DEP's poles. AT&T has a choice. DEP does not."[66] It also establishes that Duke Progress has substantial market power "when granting access to its pole infrastructure under the essential facilities doctrine...."[67] Thus, Mr. Metcalfe confuses the concept of just and reasonable rates (which is independent of a party's bargaining position) with a bargaining situation where one party (Duke Progress) previously had and currently has far

[64] Ibid, ¶ 20.

[65] Ibid and Ex. E-2.

[66] Duke Progress Answer, Executive Summary, p. ii.

[67] Dippon Initial Aff., ¶ 22.

less to lose than the other party (AT&T). Under such circumstances, the dominant party can use this leverage to obtain its desired result. This is precisely what Duke Progress has done to AT&T.

38. Not surprisingly, because of his confusion between rates resulting from unequal bargaining power versus rates that are just and reasonable, Mr. Metcalfe's affidavit makes no mention of competitive neutrality other than in a section describing my analysis.[68] If Duke Progress bases CLEC and CATV attacher rates on the FCC's new telecom formula and AT&T's rates on the cost of placing its own poles, it is impossible to achieve competitive neutrality.

III. MR. METCALFE DID NOT IDENTIFY ANY NET MATERIAL BENEFIT THAT JUSTIFIES CHARGING AT&T A RATE HIGHER THAN THE NEW TELECOM RATE

39. Duke Progress claims it rebutted the presumption that AT&T should be charged a new telecom rate with "the economic evaluation submitted by Mr. Kenneth P. Metcalfe, CPA, CVA."[69] I disagree.

40. Mr. Metcalfe provides calculations that focus on three theories that he may or may not see as additive. First, AT&T receives, as the "benefit of the bargain," a right to remain attached to existing Duke Progress poles after the JUA terminates that should be valued based on the cost of a replacement network. Second, AT&T purportedly avoided make-ready and other costs when it attached to Duke Progress' poles that should be valued based on the cost of replacing Duke Progress' poles with taller poles. Third, AT&T has derived a benefit from space

[68] Metcalfe Decl., ¶ 48.

[69] Duke Progress Answer, ¶ 13.

on Duke Progress' poles and other alleged but unquantified benefits. Each theory is fatally flawed.

A. Mr. Metcalfe's Benefit of The Bargain Theory Is Wrong

41. Mr. Metcalfe is wrong in his claim that AT&T is competitively advantaged by a "benefit of the bargain," which gives AT&T the right to remain attached to existing Duke Progress poles after the JUA terminates. According to Duke Progress, "AT&T, in essence, has a unilateral perpetual license option on 148,000 joint use poles owned by DEP."[70] It asserts that this "eliminates the need (or even the contingency) of constructing a new network of 148,000 poles in the event of a termination."[71] Mr. Metcalfe characterizes this alleged benefit as "avoided system replacement costs," and values it at [redacted] per pole per year.[72]

42. There are several conceptual and factual errors in Duke Progress' allegation and Mr. Metcalfe's accounting exercise. First, the entire exercise is irrelevant because what Mr. Metcalfe attempts to measure does not provide AT&T with a net *competitive* benefit.[73] Under this theory, Mr. Metcalfe attempts to quantity the value of a perpetual license because, as Mr. Metcalfe understands the JUA, Duke Progress cannot require AT&T to remove its attachments on *existing* JUA poles if the JUA terminates; it can only prevent it from attaching to *new* poles (i.e., poles to which AT&T does not yet attach). However, per Mr. Metcalfe's own finding, "Duke Energy Progress is required by the FCC to provide mandatory access to CLECs and

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[70] Ibid, ¶ 38.

[71] Ibid, Executive Summary, p. ii.

[72] Metcalfe Decl., ¶ 20.

[73] Duke Progress' Answer incorrectly claims that I offered no economic analysis about the alleged benefits Duke Progress claims AT&T receives. See Duke Progress Answer, ¶ 32 n.144. In fact, paragraphs 37–46 of my Initial Affidavit includes this analysis.

CATVs, but is not required to provide mandatory access to AT&T, in those areas where AT&T is the ILEC."[74] Further, he notes that this is a material *disadvantage* for AT&T.[75] However, in his calculations, Mr. Metcalfe entirely ignores the fact that CLEC and CATV attachers have access rights to *all* poles, *existing and new*, at all times. As stated by the FCC:

> The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.[76]

Thus, if anything, the JUA improves (but does not eliminate) the material disadvantage that Mr. Metcalfe acknowledges and thus provides no net advantage to AT&T over CLEC and CATV attachers. Thus, Mr. Metcalfe's "benefit of the bargain" calculation is meaningless because the so-called "perpetual license" or "evergreen" provision in the JUA provides no net competitive benefit to AT&T.

43. Second, the Enforcement Bureau already rejected a similar effort to price pole attachment rates based on the value of a complete pole network, stating:

> FPL further attempts to calculate the monetary value of AT&T's guaranteed access by assuming that, without the JUA, AT&T would have built a duplicate pole network. But, as Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles."[77]

Mr. Metcalfe wholly ignores the Enforcement Bureau's decision, while attempting the exact same flawed exercise.

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[74] Metcalfe Decl., ¶ 9.

[75] Ibid.

[76] *Pole Attachment Order*, ¶ 10 (footnotes omitted).

[77] *FPL Order*, ¶ 15.

44. Third, Mr. Metcalfe's calculation is unsupported, hypothetical, and entirely unrealistic. Mr. Metcalfe has no documentation for any of his data and simply cites "discussions with Scott Freeburn" and "Duke Energy Progress' estimating system" as his sources.[78] Mr. Freeburn provides no further specificity in his declaration, instead stating that he obtained an uncorroborated estimate of the "cost of constructing new pole lines" from a "work order system."[79]

45. It is also highly unlikely that Duke Progress ever purchased over 148,000 poles *at one time* and thus would know how much each pole would cost if purchased in these quantities. More important, the entire accounting exercise—which consists of Mr. Metcalfe taking unsupported numbers from Mr. Freeburn and annualizing them—is meaningless. As I stated previously, duplicating Duke Progress' pole network is "not economically feasible or socially desirable."[80] Hence, quantifying the cost of a dystopian world in which there are two poles placed next to each other at every location adds no value to this matter.

B. Mr. Metcalfe's "Make-Ready" Theory Is Incorrect

46. Mr. Metcalfe engages in a similar hypothetical accounting exercise when calculating the purported benefit AT&T receives from allegedly avoiding make-ready costs because of the JUA. Underlying Mr. Metcalfe's calculation is an assumption that but-for the JUA, Duke Progress would have built a network of shorter poles and that—had AT&T sought to attach facilities, "AT&T would have paid make-ready costs to replace virtually all of Duke

[78] Metcalfe Decl., Ex. E-2.

[79] Freeburn Aff., ¶ 36.

[80] Dippon Initial Aff., ¶ 22.

Energy Progress's poles with taller poles."[81] Mr. Metcalfe claims these "avoided pole replacement costs" are valued at [redacted] per pole per year.[82] There are several errors with this claim as well.

47. First, recent decisions from the Commission and Enforcement Bureau preclude Mr. Metcalfe's "make-ready" theory. Just last month, the Commission rejected an attempt to set rates based on "the cost … of building poles tall and strong enough to accommodate [communications] attachments."[83] The Enforcement Bureau similarly found it unreasonable to set rates based on the assumption that "without the JUA, AT&T would have built a duplicate pole network."[84] And since Mr. Metcalfe says a duplicative network would cost [redacted] per pole per year, it must be unreasonable to assume that without the JUA, AT&T would have followed behind Duke Progress and replaced each of its poles with a taller pole (at a higher cost of [redacted] per pole per year, according to Mr. Metcalfe). It is impossible to conclude that a regulator a half-century ago would have considered it prudent for two rate-of-return regulated utilities sharing common ratepayers to build and then rebuild the pole line both companies required. It is even more inconceivable today.

48. Second, the Commission and the Enforcement Bureau have rejected Mr. Metcalfe's underlying assumption that but for joint use with ILECs, electric utilities would have built networks of shorter poles:

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[81] Metcalfe Decl., Ex. E-4.1.

[82] Ibid, ¶ 30.

[83] *Verizon Maryland LLC v. The Potomac Edison Company*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009, Memorandum Opinion and Order, ¶ 32 (2020) (hereinafter *Potomac Edison Order*).

[84] *FPL Order*, ¶ 15.

> FPL did not build its poles just to accommodate AT&T. By 1978, cable attachments were so common that Congress saw fit to regulate their rates, and, by 1996, section 224 of the Act was amended to provide cable and competitive LECs a statutory right of access.[85]

Duke Progress claims that this precedent "is of no consequence."[86] I disagree. The precedent applies directly to Duke Progress. Publicly available data confirm that utilities that build a stronger and taller pole network do so for reasons unrelated to a JUA. Consider Florida Power and Light Company ("FPL"). Counter to Duke Progress' claim that taller and stronger poles are necessary because of an ILEC's attachment, as next explained, FPL installed more taller poles when an ILEC was *not* attached than when an ILEC was attached. There is no reason to believe that the result would differ in Duke Progress' territory.

49. The following table includes, by percentage, the pole lengths of FPL's poles and Verizon's poles (then an ILEC in FPL's territory) in 2013. Column (a) shows the percentage of poles by height where the poles only have electric utility (FPL) attachments. Column (b) reports the percentages for poles under the JUA with Verizon. Column (c) presents percentages of poles with a third-party attachment, but not an ILEC attachment. Finally, column (d) reports the percentages of poles by height then owned by Verizon. Analyzing these percentages reveals that FPL did not install a taller pole network because of the JUA with Verizon:

[85] Ibid, ¶ 15; *see also Potomac Edison Order*, ¶ 32.

[86] Duke Progress Answer, ¶ 16 n.58.

FPL and Verizon Pole Percentages by Height and Attacher (2013)

	FPL Poles			Verizon
	Only FPL Attachments (a)	Joint-Use Pole (b)	Third-Party But No Verizon Attachments (c)	Joint-Use Pole (d)
30' & shorter	19.6%	13.4%	10.1%	45.1%
35'	11.5%	18.2%	14.1%	35.7%
40'	51.3%	58.4%	49.1%	18.2%
45'	13.1%	8.2%	20.3%	0.9%
50' & higher	4.6%	1.9%	6.5%	0.1%
Poles	100,765	67,159	38,799	7,018
% over 30'	80.5%	86.7%	90.0%	54.9%
% over 35'	69.0%	68.5%	75.9%	19.2%

Source: Affidavit of Timothy J. Tardiff, Ph.D. Verizon Florida LLC v. Florida Power and Light Company, Before the Federal Communications Commission, Docket No. 15-73, March 13, 2015, Table 1.

Column (a) of this table reveals that 80.5 percent of FPL's poles that had only an electric utility's attachments (i.e., no ILEC or third-party attachment) were taller than 30 feet and 69 percent (over 2/3) were taller than 35 feet. This negates Mr. Burlison's claim that but-for the JUA Duke Progress "could have installed 30 or 35-foot poles."[87] The FPL example demonstrates that electric utilities regularly install poles taller than 35 feet without any communications facilities attached. Also of interest is the data reported in column (b) because it shows that slightly *fewer* electric utility poles were taller than 35 feet when shared with an ILEC (68.5 percent) than when used exclusively by the electric utility (69.0 percent). And column (c) then reveals that electric utility poles with *only* third-party attachments (i.e., no ILEC attachment) were taller than electric utility poles shared with ILECs and electric utility poles used exclusively by FPL. In other

[87] Burlison Decl., ¶ 12; see also Answer Ex. D (Metcalfe Decl. at Ex. E-2.1 (citing Freeburn Decl.)).

words, the poles were the tallest in the two scenarios in which an ILEC was *not* attached. FPL's data thus demonstrate that it is not necessary to build taller poles simply because of a JUA.

50. Third, Mr. Metcalfe's theory is disconnected from the JUA at issue, which was entered into in 2000. By 2000, AT&T had facilities on over 84 percent of the parties' joint use poles currently owned by Duke Progress.[88] Mr. Metcalfe nonetheless bases his make-ready claim entirely on unsubstantiated "discussions" with Mr. Freeburn that Duke Progress installed 40-foot poles because of a prior 1977 JUA, when it claims it would have installed shorter 30- or 35-foot poles otherwise.[89] Mr. Freeburn likely does not know what Duke Progress would or would not have done in 1977 when the 1977 JUA was entered because he did not join Duke Progress' predecessor company until 2004 and he does not source his information.[90] Nor are allegations about Duke Progress' conduct in 1977 relevant to the rate justified post 2011 under a JUA entered in 2000. Furthermore, the evidence contradicts his premise. The 1977 JUA shows that 40-foot poles were not required if a shorter pole would meet the requirements of both parties.[91] Therefore, it is not true that Duke Progress was ever forced to install 40-foot poles because of the former JUA, and it is certainly not true today. Per Mr. Burlison, Duke Progress' "typical vertical three-phase construction" *without* AT&T attached involves a 40-foot pole.[92]

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[88] Miller Aff. ¶ 6 (stating AT&T currently uses 148,064 Duke Progress poles); ibid, ¶ 7 (stating AT&T used 125,067 Duke Progress poles in 1987, which was the most contemporaneous information available to AT&T).

[89] See Metcalfe Decl., ¶ 30 n.44 & Ex. E-3.1; *see also* Freeburn Decl., ¶ 12; Burlison Decl. ¶ 12.

[90] Freeburn Decl., ¶ 1.

[91] 1977 JUA, Article I.B.

[92] Burlison Decl., ¶ 14.

51. Indeed, the premise of Mr. Metcalfe's valuation also renders it irrelevant because Duke Progress' installation of 40-foot poles does not *competitively* advantage AT&T. A 40-foot pole can accommodate AT&T *and* its competitors, and in many cases, a 35-foot pole can as well.[93] The fact that Duke Progress installed poles that could accommodate communications attachers applies equally to AT&T and its competitors. Thus, this is not a net competitive benefit.

52. Fourth, Mr. Metcalfe's assumption that AT&T would have had to replace all of Duke Progress' poles in this hypothetical scenario is rebutted by the 1972 document Duke Progress attached to its Answer. It states:

Mr. Metcalfe nonetheless assumes that AT&T would have replaced 100% of Duke Progress' poles.[95] At the same time, he fails to give AT&T any credit for the high rental rates that AT&T *did* pay over the entirety of the JUA—rates that far exceeded the rental rates paid by AT&T's competitors.

53. Fifth, Mr. Metcalfe also has no source data to support his pole replacement cost; he simply states, [redacted]

[93] See Peters Reply Aff., ¶ 9.

[94] Duke Progress Answer, Ex. 6 at DEP000180 (emphasis added).

[95] Metcalfe Decl., Ex. E-4.1.

[redacted][96] Mr. Freeburn provides little additional information, except to state that the [redacted] per pole estimate is Duke Progress' "average wood pole replacement cost for the year ending 2019 … based on 3,586 wood pole replacements."[97] Mr. Freeburn thus included all pole replacements of all sizes in his estimate, rendering it incapable of estimating the specific cost to replace a 30- or 35-foot pole with a 40-foot pole. Yet, Mr. Metcalfe fails to appreciate or does not acknowledge this inconsistency with his theory. Further, he does not mention if he tried to verify independently the information he was provided.

54. Mr. Metcalfe's use of the 2019 average cost that Mr. Freeburn provided is flawed for another reason as well. He uses 2019 costs, instead of historic costs, to estimate what AT&T would have had to pay to replace Duke Progress' poles *when AT&T made its initial attachment.* Any such costs would have been incurred long ago. By 1987, AT&T had attachments on 125,067 Duke Progress poles.[98] There is no justifiable basis to set rates as though AT&T were paying to replace poles a half century ago at estimated 2019 costs.

C. Mr. Metcalfe's Other Quantification Exercises Are Also Misplaced

55. The remainder of Mr. Metcalfe's analysis also suffers from oversimplification and unsupported data. He simply adopts his client's claim that AT&T should be assigned 3.33 feet of safety space on the pole and 3 feet of space allocated by the 1977 JUA (not the current JUA, which has no space allocation),[99] without even citing the FCC decisions that preclude these space

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[96] Ibid.

[97] Freeburn Decl., ¶ 35.

[98] Miller Aff. ¶ 7.

[99] Metcalfe Decl., ¶¶ 32-37, fn. 54.

assignments because they do not reflect space that AT&T actually occupies on the pole.[100] With respect to the 3.33 feet of safety space, Mr. Metcalfe simply states that from "an economic cost-causation perspective, and under the current circumstances, it would be more equitable to allocate 100% of the safety space to the licensee."[101] It is unclear what Mr. Metcalfe means because he provides no analysis or explanation of his "economic cost-causation" analysis or the "current circumstances" to which he refers. Mr. Metcalfe's opinion is also beside the point because the FCC already considered this issue and ruled that the safety space must be allocated to the power company, not the communications attacher, when calculating rates.[102]

56. With respect to the 3 feet of space allocated to AT&T by the 1977 JUA, Mr. Metcalfe admits "the current JUA does not explicitly allocate the usable space between Duke Energy Progress and AT&T."[103] He nonetheless reads in "an implicit allocation" of 3 feet of space "through the rental rates in the agreement."[104] But unreasonably high rental rates do not create a space allocation that does not exist. Furthermore, AT&T "does not need, want, or use 3 feet of space across Duke Progress' poles for its existing facilities, for future facilities, or for any other purpose, and it cannot sublet that space to others."[105] Rates must be based on "space that is

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[100] *FPL Order*, ¶ 16 (citing authorities).

[101] Metcalfe Decl., ¶ 33.

[102] See *Pole Attachment Order*, ¶ 192; see also ibid, ¶ 180 n.559 (quoting *Consolidated Partial Order*, ¶ 51 as "finding that 'the presence of the potentially hazardous electric lines … makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers,' and further that this 'space is usable and is used by the electric utilities'").

[103] Metcalfe Decl., ¶ 38.

[104] Ibid.

[105] See Peters Reply Aff., ¶ 27.

'actually occupied.'"[106] Mr. Metcalfe does not cite this settled ratemaking principle or the FCC's decision nearly a quarter century ago that space on a pole *cannot* be "reserved" for an ILEC.[107] The FCC required competitively neutral rates in order to eliminate outdated rate disparities, not to lock in obsolete space assignments that will forever set AT&T at a competitive disadvantage.

57. Mr. Metcalfe also tries to add to his flawed "benefit of the bargain" valuation by claiming that AT&T also avoided "contingency costs" because it does not need to be ready at all times "to install its own network of poles within a short period of time" should Duke Progress terminate the JUA.[108] Mr. Metcalfe bases his analysis on his "understand[ing] from Mr. Freeburn" that if the JUA did not include an evergreen provision, the parties "would need to procure and hold in inventory the number of joint use poles currently owned" by the other party, which "would include purchasing land and equipment necessary to store the poles in inventory."[109] Mr. Metcalfe claims this alleged benefit of not having to incur procurement and storage costs to be ready to duplicate a pole network on 60 or 120 days' notice is [redacted] per year.[110] This argument is just as fanciful and irrelevant as Mr. Metcalfe's "benefit of the bargain" argument. Mr. Metcalfe himself admits that Duke Progress' ability to deny AT&T access to its poles after termination sets "ILECs … at a material disadvantage compared to

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[106] *FPL Order*, ¶ 16.

[107] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16053 (¶ 1170) (1996) ("Permitting an incumbent LEC, for example, to reserve space for local exchange service … would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers.").

[108] Metcalfe Decl., ¶ 22.

[109] Ibid, ¶ 23.

[110] Ibid. & n.26; see also ibid, Ex. E-3.

CLECs and CATVs" due to their statutory right of access.[111] Thus, the benefit does not exist. It also does not involve any costs Duke Progress has ever or will ever incur, so Duke Progress "may not embed" those nonexistent costs in AT&T's rental rate.[112]

58. Mr. Metcalfe also repeats his flawed pole replacement theory by claiming that AT&T has benefitted from the JUA because taller and stronger poles have higher carrying costs for Duke Progress than shorter poles that are "only tall enough to accommodate Duke Energy Progress' own attachments."[113] The argument is just as meritless the second time around. In addition, it ignores the fact that the FCC has found that the new telecom rate, which is calculated using Duke Progress' pole costs, is "fully compensatory."[114]

59. Mr. Metcalfe also claims that the "JUA formula has not changed since 2000" and, because the formula adjusts rates each year using the Handy Whitman index, "[t]his means that the rental rate will essentially remain unchanged as the Handy Whitman index simply calculates cost trends …."[115] It is unclear what Mr. Metcalfe attempts to demonstrate with this point. As explained in my Initial Affidavit, AT&T has long overpaid for access to Duke Progress' pole network.[116] Thus, Mr. Metcalfe is merely stating that the overcharge has remained relatively constant. Clearly, this adds no value and does not negate the fact that AT&T has long paid Duke Progress an unjust, unreasonable, and competitively unequal rate.

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[111] Ibid, ¶ 9.

[112] *Dominion Order*, ¶ 18.

[113] Metcalfe Decl., ¶ 45.

[114] *Pole Attachment Order*, ¶ 137.

[115] Metcalfe Decl., ¶ 51.

[116] See Dippon Initial Aff., ¶¶ 13-14.

60. Finally, Mr. Metcalfe claims that AT&T "is not required to and does not pay inspection or permitting costs when attaching to a JUA pole."[117] Mr. Metcalfe values this alleged benefit at [redacted] per pole per year.[118] There are several errors with Mr. Metcalfe's analysis that render it unsupported and incorrect. First, Mr. Metcalfe's only support for the existence and fees underlying his calculation are "discussions" with Mr. Freeburn that "[w]hen CLECs and CATVs seek to attach to JUA poles, … Duke Energy Progress charges fees to cover inspection and permitting costs.[119] However, I understand that Duke Progress has not established through invoices or payment records that it has in fact charged AT&T's competitors any fees.

61. Second, Mr. Metcalfe fails to understand that this information alone does not establish a net competitive advantage. As explained by Mr. Peters, "AT&T incurs the same costs to itself inspect its new and existing AT&T attachments to ensure their compliance with safety standards and specifications. AT&T's technicians perform a post-attachment inspection on every new AT&T attachment and conduct regular and ongoing inspections on AT&T's poles and attachments when working in the field."[120] Hence, AT&T incurs inspection and permitting costs through its internal cost structure and therefore enjoys no net benefit over its competitors.

62. Third, Duke Progress' license agreement for other attachers does not include the fees Mr. Metcalfe relies upon and describes inspections only as a possibility: "Licensor may conduct inspections from time to time as necessary in Licensor's sole judgment to determine

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[117] Metcalfe Decl., ¶ 25.

[118] Ibid, ¶ 27.

[119] Ibid, ¶ 26.

[120] Peters Aff. ¶ 13.

whether Licensee's Attachments meet the technical requirements and specifications...."[121] It cannot be a *competitive* advantage if AT&T inspects all of its attachments whereas Duke Progress may on occasion, but is not contractually obligated to, inspect some of the CLEC's or CATV's attachments.

63. Fourth, it appears that Mr. Metcalfe selected the fees for his analysis solely because Mr. Freeburn claims that Duke Progress charges each of the fees to its licensees to cover Duke Progress' costs.[122] Duke Progress does not incur comparable costs for AT&T however because, as explained by Mr. Peters, AT&T engineers its own attachments, performs much of its own make-ready work (and pays Duke Progress for the make-ready work that it requires Duke Progress to perform), and "incurs the same costs to itself inspect its new and existing AT&T attachments to ensure their compliance with safety standards and specifications."[123] Because Mr. Metcalfe's analysis does not account for the costs AT&T incurs by completing work itself, it is meaningless.[124]

64. Fifth, Mr. Metcalfe does not attempt to quantify any "avoided" costs associated with deployment going forward (the only relevant question when setting rates going forward). Instead, he limits his analysis to the alleged costs "avoided" when AT&T deployed its facilities on Duke Progress' existing poles. However, AT&T has more than covered those costs, which are already priced in Mr. Metcalfe's 2019 costs (rather than at historic costs). Mr. Metcalfe's analysis fails to give AT&T any credit for the high rental rates that AT&T has been paying over

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[121] See Duke Progress Answer, Ex. 7, § 7.1.

[122] Metcalfe Decl., ¶ 26.

[123] Peters Aff., ¶¶ 13, 17.

[124] See, e.g., *Potomac Edison Order* ¶ 32; *Dominion Order* ¶ 18; *FPL Order* ¶ 15.

the entirety of the 1977 and 2000 JUAs or even the nine years since the FCC recognized that ILECs were statutorily entitled to just and reasonable rates—rates that far exceeded the rental rates paid by their competitors. Using 2019 as an example, Duke Progress charged AT&T [redacted] per pole, but it charged AT&T's competitors a [redacted] cable rate or [redacted] new telecom rate.[125] AT&T's decades of higher rental rates have more than covered any allegedly avoided [redacted] per-pole per-year cost associated with the deployment of the existing network.

IV. DUKE PROGRESS' 1972 BELL SYSTEM PRACTICE CLAIM DOES NOT SUPPORT THE CONTENTION THAT THE JUA RATES ARE JUST AND REASONABLE AND COMPETITIVELY NEUTRAL

65. Duke Progress argues that the JUA's rate provision must be equitable because a 1972 Bell System Practice (BSP) purportedly [redacted] percentages that are close to the [redacted] and [redacted] percentages that Duke Progress reads into the JUA rate formula.[126] There are several serious problems with Duke Progress' inference.

66. First, an outdated BSP about rates over 45 years ago says nothing about whether the pole attachment rates that Duke Progress charges AT&T today are just, reasonable, and competitively neutral. It is an understatement to say that much has changed in the industry over this period, particularly in the last 10 years or so.

[125] See Answer, ¶ 12.

[126] See Metcalfe Decl. ¶ 32 n.54; Duke Progress Answer, ¶ 26.

67. Second, the numbers in the BSP are stylized, as the document states that it uses [redacted][127] Hence, Duke Progress' observation that the percentages in the JUA are [redacted] is mere coincidence and not an admission of fairness. In fact, Duke Progress relies on a cost allocation methodology in the BSP that is entirely different from that employed in the JUA. The BSP defines the [redacted] as:

[redacted]

The JUA differs entirely because it does not include any consideration of "nonjoint construction." Rather, the JUA relies on Duke Progress' total annual pole costs.[129] Thus, whereas the BSP arrives [redacted] the JUA covers Duke Progress' investment in joint use poles only.

68. Third, the BSP did not promise cost savings for AT&T but instead recognized that joint use was often a necessity as [redacted][130] The BSP also recognizes that given [redacted]

[127] Bell System Practices, AT&T Co Standard, Section 937-217-126, Division of Cost Methods In Formulating Joint Use Agreements, Issue 1, September 1972, Section 2.02, attached to Duke Progress Answer as Exhibit 6 (hereinafter BSP).

[128] BSP, Section 5.01.

[129] 1977 JUA, Article XII.D; see also JUA, Article XIII.C.

[130] Cost Methods, Section 1.04.

[redacted] In fact, the BSP recognizes that joint use [redacted]

69. Finally, contrary to what Duke Progress portrayed, nowhere in the BSP does AT&T say that it is content with the [redacted]. Rather, the BSP is a [redacted] That did not mean that the cost-sharing methods then being confronted by negotiators for two rate of return regulated entities produced just and reasonable rental rates or would be relevant for all time. The BSP dates back to 1972, and there is no reason to believe, let alone mentioned in the BSP, [redacted]. Given the market developments since the Pole Attachment Act was enacted in 1978 in which CATV, CLEC and wireless attachers provide an additional revenue source to Duke Progress as a pole owner, it is highly unlikely that anyone would describe a [redacted] if it ignored this revenue from CATV, CLEC, and wireless attachers. In contrast, as discussed in my Initial Affidavit, the FCC's

[131] Ibid.

[132] Ibid, Section 1.08.

[133] Ibid, Section 1.02.

new telecom formula is the "equitable" cost-sharing methodology today.[134] That is, the FCC's new telecom rate specifically accounts for market developments (e.g., an increased number of communications attachers) and reflects several other real-world realities (including allocating the safety space to the power company). Hence, it presents an economically superior outcome and it aligns with AT&T's stated desire in 1972 for an equitable cost-sharing arrangement.

V. MR. METCALFE'S CRITICISMS OF MY TESTIMONY ARE MISDIRECTED

70. Duke Progress in large part ignores my Initial Affidavit, citing it just once and for the unremarkable fact that "AT&T competes with CATVs."[135] Mr. Metcalfe appends some brief criticisms of my Initial Affidavit to the end of his affidavit. Mr. Metcalfe declares that Duke Progress does not enjoy or exercise bargaining power.[136] He further asserts that reciprocal benefits provided by the JUA do not zero out.[137] I reply to each of these incorrect arguments in turn.

71. First, Mr. Metcalfe opines, "Duke Energy Progress' actions do not appear to support [an exercise of bargaining power] claim."[138] Mr. Metcalfe's principal arguments are that the rates have not increased and that the JUA offers the alleged benefits I already refuted. These arguments are no more credible when made in the context of a bargaining power argument. They do not establish that the JUA rates are just, reasonable, or competitively neutral and provide no

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[134] Dippon Initial Aff., ¶ 33.

[135] Duke Progress Answer, ¶ 12 n.39.

[136] Metcalfe Decl., ¶ 50.

[137] Ibid, ¶ 55.

[138] Ibid, ¶ 50.

basis for Duke Progress' insistence on JUA rates that far exceed the FCC's mandated rate ceiling (the preexisting telecom rate formula).

72. Mr. Metcalfe ignores the numerous analyses conducted by the FCC regarding bargaining power in the context of pole attachments. As a result, he fails to note that AT&T owns proportionally fewer poles (just 17% to Duke Progress' 83%) than the example that the FCC provided when it found that market forces were not alone sufficient to ensure just and reasonable rates because "electric utilities appear to own approximately 65–70 percent of poles."[139] In addition, Mr. Metcalfe, as described above, confirms that Duke Progress' pole ownership advantage gives it the negotiating advantage that the FCC recognized. He calculates the replacement cost that AT&T would have to incur absent joint use with Duke Progress, and he shows that AT&T's costs would far exceed those incurred by Duke Progress in that scenario.[140] Duke Progress and Mr. Metcalfe thus confirm and reinforce the FCC's decision to ensure that pole attachment rates are just and reasonable and competitively neutral because "the marketplace evidence" shows that "market forces and independent negotiations" are not "sufficient to ensure just and reasonable rates, terms and conditions" for AT&T's use of Duke Progress' poles.[141]

73. Second, Mr. Metcalfe expresses surprise that I do "not acknowledge that Duke Energy Progress' significantly greater pole ownership results in AT&T receiving the great

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[139] *Pole Attachment Order*, ¶ 206; *see also ibid*, ¶ 206 n.618 ("As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles. As a result, the incumbent LEC would have less bargaining power than the electric utility.").

[140] Metcalfe Decl., ¶¶ 18–24.

[141] See *Pole Attachment Order*, ¶¶ 199, 208.

majority of any 'reciprocal' benefits for avoided permitting fees."[142] Mr. Metcalfe misunderstands the FCC's competitive neutrality principles, and so does Duke Progress when it claims, "AT&T relies upon the false premise that, because the benefits of the joint use agreement are reciprocal, they cancel each other out."[143]

74. Unlike Mr. Metcalfe's and Duke Progress' understanding of the situation, the question is not whether AT&T "benefits" more from the JUA than Duke Progress does. Instead, the FCC's competitive neutrality principle dictates that Duke Progress can only charge AT&T rates higher than the rates resulting from the new telecom formula if it can demonstrate that AT&T receives a material net competitive benefit *relative to AT&T's CLEC and cable competitors*. As a result, it is relevant that AT&T incurs costs under a Joint Use Agreement that Duke Progress does not impose on AT&T's CLEC and cable competitors. Some of those costs are associated with reciprocal provisions that require AT&T to extend the same alleged "benefit" to Duke Progress that Duke Progress extends to AT&T. In addition, those reciprocal terms often apply equally to AT&T and Duke Progress irrespective of pole ownership numbers, and so net out to zero.[144] Others instead impose far higher costs on AT&T than on Duke Progress—such as the far higher cost Mr. Metcalfe agrees would be imposed on AT&T should the parties lose their contractual right of access to each other's poles.[145]

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[142] Metcalfe Decl., ¶ 49.

[143] See Duke Progress Answer, Executive Summary, p. i.

[144] See, e.g., Dippon Initial Aff., ¶ 41; Peters Reply Aff., ¶ 4.

[145] See Metcalfe Decl., Ex. E-2.

VI. CONCLUSION

I have carefully reviewed and considered Duke Progress' Answer, including its supporting declarations, affidavit, and exhibits. I find that the arguments Duke Progress presents are inaccurate and contrary to the FCC's deployment and competition goals and that the work of Mr. Metcalfe is deeply flawed and of little (if any) value to the present matter. My conclusion remains that the pole attachment rates that Duke Progress has charged AT&T since 2017 have not been, and will not be, just and reasonable or competitively neutral rates. I recommend that the FCC set the just and reasonable rate for AT&T's use of Duke Progress' poles as the properly calculated per-pole new telecom rate because Duke Progress has not shown that AT&T receives net benefits under the JUA that provide it a material advantage over its CLEC and cable competitors.

Washington, District of Columbia
The foregoing instrument was subscribed and sworn before me this 16th day of December, 2020
by Darlene Francesca Rogers
Notary Public
My commission expires 08/14/2024

Christian M. Dippon, Ph.D.

Sworn to before me on
this 16th of December 2020

Notary Public

DARLENE FRANCESCA ROGERS
NOTARY PUBLIC
DISTRICT OF COLUMBIA
COMMISSION EXPIRES 08-14-2024